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Between Conciseness and Transparency: Presuppositions in Legislative Texts

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Abstract Presupposition is the semantic-pragmatic phenomenon whereby a statement contains an implicit precondition that must be taken for granted (presupposed) for that statement to be felicitous. This article discusses the role of presupposition in legislative texts, using examples from Swiss constitutional and administrative law. It illustrates (a) how presuppositions are triggered in these texts and (b) what functions they come to serve, placing special emphasis on their constitutive power. It also demonstrates (c) how legislative drafters can distinguish between "good" presuppositions and "bad" presuppositions by weighing their main advantage, conciseness, against their main flaw, reduced transparency. The present study argues that, if employed carefully, presuppositions can be a useful stylistic means to keep legislative texts free from unnecessary clutter that merely elaborates on the obvious; however, it also suggests that, if applied wrongly, presuppositions can camouflage the duties and obligations placed on the subjects of a law and thus impede its accessibility and its efficient and effective implementation.

Keywords Presupposition · Language and law · Legislative drafting · Constitutional law · Administrative law

1 Introduction

The king of France is bald.

Ever since Russell [21] and Strawson [28] discussed this sentence in their respective essays on denotation, it has become the classic example of a statement that includes a presupposition. The argument goes that, explicitly, the sentence *asserts* that the king of France is bald and, implicitly, it *presupposes* that there is a

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king of France in the first place. The sentence thus serves to illustrate the general nature of presuppositions as preconditions that are implicitly taken for granted by certain linguistic expressions (or rather by the speakers uttering them). The phenomenon of presupposition has been studied extensively from the perspectives of formal semantics, pragmatics and the philosophy of language [2, 5, 6, 8, 10, 12, 22, 25–27, 29].

Recently, presupposition, among other types of implicit content, has also begun to be investigated in the philosophy of law: Marmor [15–17] argues that in legislative texts, presuppositions[1] form part of "what the law prescribes", that is, that the legislator commits himself to the contents implied by presuppositions and that these contents thus have the status of legal provisions:

> Semantically encoded implications and/or presuppositions are relevant in the legal context just as they are in ordinary conversation. Communicative commitments that derive from the meaning of the expression used are normally part of what the law prescribes, even if the implicated content is not entirely specified by the meaning of the legal utterance. [16, p. 451]

The aim of the present study is to link this theoretical insight to the practice of legislative drafting, using examples from Swiss constitutional and administrative law.[2] In particular, I will (a) identify some of the most common and consequential presupposition triggers in legislative texts, (b) describe the functions that the respective presuppositions serve in these texts, and (c) reflect on the phenomenon from the perspective of legislative drafting, i.e. ask how legislative drafters can distinguish between "good" presuppositions and "bad" presuppositions. The approach I take in this study is thus primarily descriptive (a, b), but it is complemented with considerations of a more prescriptive nature, viz. questions relating to principles of good practice in legislative drafting (c).

The paper is organised as follows. I will begin by giving a brief overview of the linguistic properties that are commonly said to define presuppositions (Sect. 2). I will then analyse a number of linguistic constructions that trigger presuppositions in legislative texts, and discuss the functions they fulfil in the particular context of constitutional and administrative law (Sect. 3). On the basis of these observations, I will finally propose a number of criteria for how legislative drafters can distinguish between "good" and "bad" presuppositions in legislative texts (Sect. 4).

2 Definitions

The literature differentiates between the notion of semantic (or conventional) presuppositions, which are elicited by specific linguistic expressions, and a broader

[1] Marmor [15, 16, 17] refers to the respective set of phenomena as "semantically implied content" or "semantically encoded implication/semantically encoded presupposition".

[2] Swiss federal law is drafted in German and in French and then translated into Italian. Once published, all three language versions are considered equally authentic [14]. In this paper, I will specifically look at examples from German-language texts. For each example, I will provide the authentic German wording as well as a translation into English.

conception of pragmatic (or conversational) presuppositions, which include a wide range of general background knowledge activated and alluded to in communicative interactions [3, 13, 25]. In this paper, I use the term "presupposition" in the former sense, i.e. to refer to presuppositions elicited by the conventional semantics of specific linguistic expressions. However, this only concerns the extension of the phenomenon; I remain impartial with regard to the hotly debated question of whether, from the perspective of linguistic theory, such presuppositions are best explained as a property of semantics [5, 25, 28] or as a product of pragmatics [1, 11, 23, 27, 32].[3]

If conceived in the aforementioned way, presuppositions are usually defined by a set of prototypical linguistic properties that distinguish them from at least two other types of implicit content: entailments and conversational implicatures. In brief, (a) presuppositions are preconditions that must be taken for granted for a statement to be felicitous, (b) entailments are facts that logically follow from a statement, and (c) conversational implicatures are conclusions at which the hearer arrives on the basis of the assumption that the speaker is cooperative and follows the usual conversational maxims [7].

The following example illustrates these three types of implicit content:

(1) Joe has stopped working on Sundays.

a. Joe used to work on Sundays. *(presupposition)*
b. Joe does not work on Sundays anymore. *(entailment)*
c. Joe has not given up working completely. *(convers. implicature)*

For the statement that Joe has stopped working on Sundays to make sense, one has to take for granted that Joe used to work on Sundays: (1) *presupposes* (1-a). In contrast, the fact that Joe does no longer work on Sundays is not a precondition but rather a logical consequence of Joe having stopped working on Sundays: (1) *entails* (1-b). Finally, the conversational maxim of quantity ("Make your contribution as informative as is required for the current purposes of the exchange") may, in a specific situation, lead the hearer to assume that the speaker would have said so if Joe had not only stopped working on Sundays but had given up working completely; the hearer may thus infer that Joe has in fact not given up working completely. In such a conversational scenario, uttering (1) *implicates* (1-c).

Several heuristics have been suggested to determine whether some implicit content is a presupposition or rather an entailment or a conversational implicature. These heuristics test the behaviour of the respective content in specific linguistic environments. Presuppositions, for instance, are typically preserved ("projected") under negation and in similar forms of embedding, whereas entailments are not. The following modifications of sentence (1) therefore still presuppose (1-a), but they no longer entail (1-b):[4]

[3] Proponents of the latter mostly argue that presuppositions represent a form of implicature.

[4] Beaver and Guerts point out that "[i]t makes sense to try several such embeddings when testing for presupposition, because it is not always clear how to apply a given embedding diagnostic. Thus, for example, […] although it is widely agreed that *too* is a presupposition-inducing expression, the negation test is awkward to apply in this case" [3, p. 2435].

(2) a. Joe has not stopped working on Sundays. *(negation)*
b. If Joe has stopped working on Sundays, Sue will be happy. *(condition)*
c. Has Joe stopped working on Sundays? *(question)*
d. Maybe Joe has stopped working on Sundays. *(modality)*
e. Sue believes that Joe has stopped working on Sundays. *(belief)*

Projection from embedding also distinguishes presuppositions from conversational implicatures: the statements in (2) provide too weak a basis for the hearer to safely infer (1-c) by means of conversational maxims. However, conversational implicatures differ more clearly in yet another way: they can be cancelled, while presuppositions (and entailments) typically cannot. This property can be tested by combining the original statement with the negation of the implicit content in question, as illustrated in (3). In most cases, the result is contradictory for presuppositions and entailments, as seen in (3-a) and (3-b) respectively, but acceptable for conversational implicatures, as seen in (3-c):

(3) a. #Joe has stopped working on Sundays; he had not worked on Sundays.
b. #Joe has stopped working on Sundays; he still works on Sundays.
c. Joe has stopped working on Sundays; in fact, he has given up working completely.

Presuppositions are typically elicited by the semantics of specific linguistic constructions, so-called presupposition triggers. Among the most commonly cited classes of presupposition triggers are definite descriptions (e.g. *The king of France* presupposes *There is a king of France*), proper names (*Jimmy Carter is going to give a speech* presupposes *There is an individual by the name of Jimmy Carter*), factive verbs (*Nancy knows that it takes 8 h to get to Rome* presupposes *It takes 8 h to get to Rome*), aspectual verbs (*Joe has stopped working on Sundays* presupposes *Joe used to work on Sundays*), implicative verbs (*Luke failed to solve the puzzle* presupposes *Luke tried to solve the puzzle*), manner adverbs (*The tortoise overtook the hare slowly* presupposes *The tortoise overtook the hare*), iteration adverbs (*Anthony did it again* presupposes *Anthony had done it before*), cleft sentences (*It was the president who decided the matter* presupposes *Someone decided the matter*) and temporal clauses (*After the company went bankrupt, all employees were made redundant* presupposes *The company went bankrupt*).

The classical triggers listed above were mostly collected from narrative discourse; not all of them also play a role in legislative texts. Conversely, certain presupposition triggers that have been considered only fleetingly can be shown to be rather important in the context of statutes and regulations.

3 Analysis

Presuppositions touch on two conflicting principles of legislative drafting: conciseness and transparency. On the one hand, presuppositions provide a means to "pack" extra content into a single linguistic expression, thus allowing for shorter

texts. On the other hand, the implicit content transported by a presupposition may remain hidden behind the content asserted explicitly and thus be hard to find. In the worst case, using presuppositions may amount to what Rosenbaum in his legislative drafting guide calls applying a trick: "If you can do things in a clever way or a simple but somewhat longer way, choose the simple way. Don't be too tricky—you may end up tricking yourself or the next person who comes to amend the law" [20, p. 9]. Legislative drafters will have to decide on a case-by-case basis whether in a specific context the advantage of using a presupposition, conciseness, prevails over its main disadvantage, lack of transparency.

In order to get an idea of the criteria according to which such a decision can be made, I will introduce a selection of linguistic constructions that frequently serve as presupposition triggers. I will look at specific examples from Swiss constitutional and administrative law and analyse the effects they have in the contexts in which they appear. The analysis of each construction will be concluded with a brief discussion of the respective examples from the perspective of legislative drafting.

3.1 Definite Descriptions

Definite descriptions are arguably the most frequent presupposition triggers in legislative texts. For the present purpose, they can be classified into two categories: (a) definite descriptions denoting entities that predate the law or rather exist independently of it and (b) definite descriptions denoting entities that only come into being by virtue of the law. This distinction is similar to Searle's distinction between "brute facts" and "institutional facts", the former relating to "those facts of the world that are matters of brute physics and biology" and the latter to "those features of the world that are matters of culture and society"; Searle points out that "[b]rute facts exist independently of any human institutions; institutional facts can exist only within human institutions" [24, p. 27]. The categorisation above differs from Searle's in that category (b) only includes facts that owe their existence to the law; facts arising from other areas of culture and society, i.e. institutional facts of an extralegal origin, are classed in category (a) together with Searle's "brute facts".

An example of a definite description denoting a fact that does not owe its existence to the law can be found in Article 50, Paragraph 3, of the Constitution of the Swiss Confederation:

(4) [Der Bund] nimmt dabei Rücksicht auf die besondere Situation […] *der Berggebiete*.

'In doing so, [the Confederation] takes account of the special position of […] *the mountain regions*.'

In the above sentence, the usage of the definite description *the mountain regions* presupposes that there are mountain regions within the territory of the Swiss Confederation. However, the existence of these regions does not depend on the provisions of the constitution but rather predates this document: it is part of what has been referred to as the extralegal, factive elements of Switzerland's constitution [30, p. 41]. This definite description thus has a purely referential function.

The second type of definite description can be found, for instance, in the provision of Article 174 of the Federal Constitution:

(5) *Der Bundesrat* ist die oberste leitende und vollziehende Behörde des Bundes.
'*The Federal Council* is the supreme governing and executive authority of the Confederation.'

In this case, the presupposition has a constitutive function: the definite description *the Federal Council* establishes that there is (or rather, that there shall be) an institution of that name. Unlike the mountain regions discussed above, and contrary to what a cursory reading of the above sentence might suggest, the institution of the Federal Council does not precede the constitution, it rather only comes into being by virtue of that very document. The presupposition triggered by the definite description *the Federal Council* performs this constitutive act. It is curious that such a consequential matter should only be expressed implicitly. Nevertheless, the Swiss Federal Constitution, along with many other constitutions, establishes all branches of government and the respective institutions by means of presupposition-triggering definite descriptions (cf. Art. 148, Para. 1, for the legislature and Art. 188, Para. 1, for the judiciary).

However, some constitutions have chosen a different approach: rather than merely presupposing the establishment of such institutions, they make the constitutive act explicit. Consider, for instance, Article II, Sect. 1, Clause 1, of the Constitution of the United States, whose content corresponds to that of the aforementioned Article 174 of the Swiss Federal Constitution:

(6) The executive Power shall be vested in *a President of the United States of America*.

In contrast to the Swiss Federal Constitution, the U.S. Constitution does not merely imply the establishment of the executive; rather, it explicitly introduces the institution of the President of the United States into its discourse by means of an indefinite noun phrase. The Constitution of Ireland expresses the act of establishing the office of a president even more explicitly (Art. 12.1):

(7) *There shall be a President of Ireland* (Uachtarán na hÉireann), hereinafter called the President, who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law.

In summary, while the Swiss Federal Constitution merely *presupposes* that there is (or shall be) a Federal Council, the U.S. Constitution and the Constitution of Ireland positively *assert* that there shall be a President of the United States and a President of Ireland, respectively.

Historically, the explicit form of establishing institutions seems to have been more prevalent. While the current Swiss Federal Constitution of 1999 establishes the Federal Council by means of presupposition, its predecessors of 1848 and 1874

(Article 83 and 95, respectively), like the U.S. Constitution, used an indefinite noun phrase to this aim:

(8) Die oberste vollziehende und leitende Behörde der Eidgenossenschaft ist *ein Bundesrat*, welcher aus sieben Mitgliedern besteht.

'The supreme governing and executive authority is *a Federal Council*, which consists of seven members.'

A similar shift from an explicit to an implicit establishment of institutions can be observed in the Anglosphere, where the form chosen to express constitutive acts seems to coincide with the use or abandonment of the modal verb *shall*: constitutions that retain *shall*, such as the Constitution of Australia, also tend to make constitutive acts explicit, while constitutions that have abandoned the use of *shall*, such as the Constitution of South Africa, usually resort to presupposition instead.[5]

The use of a presupposition can be associated with several possible reasons. A first reason for the use of a presupposition may be found where the respective institution is not actually established by the constitution but rather considered to be supra-constitutional. This may be observed in the preamble of the Constitution of Australia, which refers to "the Queen" and states that "[t]he provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom."[6] As the Constitution of Australia is in fact an Act of the Parliament of the United Kingdom at Westminster, the Queen, even as she becomes the head of state of the entity created by that constitution, appears as a super-constitutional institution in the text.

A second reason for the use of a presupposition may be the fact that, in reality, the institution to be established by the constitution already exists. Even though the respective institution would cease to exist were it not for its mentioning in the new constitution, the use of a presupposition conveys a notion of constitutional continuity. The Swiss Federal Constitution of 1999 did not alter the basic make-up of the Confederation, it was rather considered a update ("Nachführung") that codified what had become constitutional convention since the passage of its predecessor and did away with clauses that had since become obsolete [18]. The fact that it introduces the institutions of the Confederation by means of presupposition reflects this notion of constitutional continuity. In contrast, the Swiss Federal Constitution of 1848, as well as the constitutions of Australia, Ireland and the United States, marked the birth of stately entities that had not existed before and could thus not adopt any institutions from predecessor states.

A third reason for the use of a presupposition may be found in the idea that the establishment of certain institutions appears to be self-evident, that in fact these institutions do not fully owe their existence to the text of the constitution but somehow pre-exist in the sphere of natural law. This may explain why the Swiss Federal Constitution of 1948, while introducing the executive and the judiciary by

[5] For a general discussion of the use of *shall* in English-language legislative texts, cf. [31].

[6] The definite description *the Queen* here refers to Queen Victoria (reign 1837–1901).

means of indefinite noun phrases, uses a presupposition when it declares the Federal Assembly to be the Confederation's supreme authority (Art. 60). The fact that any confederation, at its heart, has an assembly of the confederates must have appeared self-evident. Linguistically, the use of the definite article may thus merely mark the presence of a bridging reference (or meronym) to the already-established entity of the Confederation. [7]

Lastly, the use of a presupposition may simply be a matter of constitutional tradition, i.e. an element of style that marks a text as a constitution in the respective language.

Both forms of constitutive acts, the explicit and the implicit, can be preceded by cataphoric references within the same text. For instance, even though formally the office of the President of the United States is only constituted in Article II, Sect. 1, Clause 1, of the U.S. Constitution, it is already referred to earlier in the text, viz. in Article I, Sect. 3, Clause 6:

(9) The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When *the President of the United States* is tried, the Chief Justice shall preside: […].

Similarly, while the Swiss Federal Council is only constituted in Article 174 of the Swiss Federal Constitution, it is first mentioned—and its existence thus presupposed—in Article 84, Paragraph 2:

(10) Der alpenquerende Gütertransitverkehr von Grenze zu Grenze erfolgt auf der Schiene. *Der Bundesrat* trifft die notwendigen Massnahmen. […]

'Transalpine goods traffic from border to border is to be carried out by rail. *The Federal Council* takes the measures required. […]'

However, these instances of definite descriptions do not have the power to forestall the constitutive act occurring later in the text; they merely represent cataphoric references to the entity established by that latter act. Otherwise, the use of the indefinite article *a* in Article I, Sect. 1, Clause 1 of the U.S. Constitution would not make sense.

In some contexts, presuppositions triggered by definite descriptions create new obligations. Consider the following excerpt from the draft of a bill intended to alter the Swiss railway legislation (cf. [9, pp. 275 f.]):

(11) Die Weiterentwicklung der Bahninfrastruktur erfolgt im Rahmen *des Entwicklungsprogramms des Bundes* und gemäss folgenden Zielen: […].

'The railway infrastructure is further developed within the framework of *the development programme of the Confederation* and according to the following goals: […].'

[7] Moreover, the role of the newly-created Federal Assembly corresponded to the role that the Diet had in the Old Swiss Confederacy. The use of a presupposition may thus also have been aimed at expressing an element of constitutional continuity.

The definite description *the development programme of the Confederation* presupposes (a) that the Confederation has a programme for the further development of its railway infrastructure and hence (b) that the Confederation has been assigned the task of devising such a programme. As there was no other mention of said programme in the remainder of the bill or elsewhere, this presupposition would effectively have imposed a new obligation on the Confederation. (The wording was eventually changed by the drafting committee of the federal administration and the obligation made explicit; cf. discussion below.)

So far, we have thus identified three functions that presuppositions may fulfil in legislative texts: (a) a *referential* function (referring to facts that exist independently of the law), (b) a *constitutive* function (establishing legal institutions), and (c) a *deontic* function (imposing obligations). A fourth function will be introduced in Sect. 3.3.

The functions identified can guide legislative drafters in their decision of whether a specific presupposition-inducing definite description is desirable. From the perspective of legislative drafting, presuppositions of the referential type are mostly unproblematic. An explicit assertion of the fact that there are mountain regions within the territory of the Swiss Confederation, for instance, would merely state the obvious and thus introduce a non-normative, declarative element into the respective legislative text, which is something that is generally discouraged by legislative drafting guidelines [4, p. 375].

If the entity referred to is not a matter of physics but an *extralegal social or cultural institution*, the situation is somewhat less clear. Social institutions are more volatile than other extralegal entities and may easily perish without the law having any say in it. Norms presupposing the existence of specific private organisations thus run the risk of becoming obsolete once the organisation to which they refer dissolves. Moreover, there may even be some cases where it is unclear whether the respective norm places an obligation on the state to step in and establish a respective body if private initiative fails. As an example, consider the following provision, which appears in the first draft of a new Federal Act on Swiss Persons and Institutions Abroad:[8]

(12) Der Bund pflegt Kontakte zu Institutionen, welche die Beziehungen der Auslandschweizerinnen und -schweizer unter sich und zur Schweiz fördern und zu einer besseren Betreuung und Vernetzung der Auslandschweizerinnen und -schweizer beitragen, namentlich *zur Auslandschweizer-Organisation*.

'The Confederation cultivates contacts with institutions that promote the relations of the Swiss abroad among each other and to Switzerland and that contribute to an improved support and interconnectedness of the Swiss abroad, specifically with *the Organisation of the Swiss Abroad*.'

This provision presupposes the existence of the Organisation of the Swiss Abroad (ASO), a private organisation aimed at representing the interests of Swiss citizens

[8] http://www.parlament.ch > Dokumentation > Berichte > Vernehmlassungen > 11.446—Pa.Iv. Für ein Auslandschweizergesetz (last visited on 22/10/2013).

living abroad. Moreover, the provision presupposes that this organisation promotes "the relations of the Swiss abroad among each other and to Switzerland" and that it contributes "to an improved support and interconnectedness of the Swiss abroad." The problem with such a provision is (a) that it becomes obsolete once the mentioned organisation dissolves, (b) that it is unclear if it still applies if the organisation were to alter its goals, and (c) that one may try to infer from it that there must in fact be an organisation promoting the listed issues. If one assumes with Marmor that presuppositions are part of "what the law prescribes" [16, p. 451; cf. section 1], one could in fact conclude that the law, in this case, prescribes that there must be such an organisation. Under specific circumstances, the use of a presupposition to refer to an extralegal institution may thus cause certain problems and uncertainties.

In contrast, whether *legal* institutions shall be constituted by means of presupposition mainly seems to depend on the linguistic conventions present in the respective legislative tradition and on the wish to express a notion of constitutional continuity. As long as the presupposition is accompanied by norms detailing the composition and powers of the institution and the procedures associated with it, little harm is done by establishing it in an implicit way; conversely, a lack of such specifications could not be remedied even if the institution was established in a more explicit way.

The most problematic type of presupposition-inducing definite descriptions are the ones that are deontic. They may obfuscate the duties and obligations imposed on the subjects of a law. The drafting committee of the Swiss federal administration[9] found, for instance, that this was the case with the statement cited in (11) above. The committee pointed out that the presupposition triggered by the definite description *the development programme of the Confederation* did not make it sufficiently transparent that the Confederation was in fact required to draw up a development programme for its railway infrastructure. It proposed an alternative wording in which the obligation was asserted explicitly:

(13) Die Weiterentwicklung der Bahninfrastruktur hat folgende Ziele: […]. *Der Bundesrat unterbreitet der Bundesversammlung in regelmässigen Abständen Programme zur Weiterentwicklung der Bahninfrastruktur (Entwicklungsprogramme)*. In den Entwicklungsprogrammen zeigt er auf, wie er die Ziele erreichen will […].

'The further development of the railway infrastructure has the following goals: […]. *The Federal Council periodically submits programmes for the further development of the railway infrastructure (development programmes) to the Federal Assembly*. In these development programmes, the Federal Council outlines how it intends to accomplish the goals […].'

The lack of transparency that can result from this type of presupposition is not only problematic because it obscures the obligations placed on the subjects of the law (the situation would be even worse if the norm imposed duties not on a government

[9] The role of the drafting committee of the Swiss federal administration has been discussed in [19].

body but on ordinary citizens). It also obstructs the findability of the respective provision, thus making the law less accessible, which in turn may impede an efficient and effective implementation of the law and unnecessarily prolongate legal proceedings.

3.2 Modal Adverbials

Adverbials expressing the manner in which something happens trigger the presupposition that the respective matter happens in the first place (e.g. *The tortoise overtook the hare slowly* presupposes *The tortoise overtook the hare*). The most frequent form in which such adverbials occur in legislative texts is that of adverbial phrases.

Consider Article 163 of the Swiss Federal Constitution:

(14) **Art. 163** Form der Erlasse der Bundesversammlung
[1] Die Bundesversammlung erlässt rechtsetztende Erlasse *in der Form des Bundesgesetzes oder der Verordnung*.
[2] Die übrigen Erlasse ergehen *in der Form des Bundesbeschlusses*; […].

'**Art. 163** Form of Federal Assembly enactments'
[1] The Federal Assembly enacts provisions that establish binding legal rules *in the form of federal acts or ordinances*.
[2] Other enactments are issued *in the form of federal decrees*; […].'

Paragraph 1 states that the form in which the Federal Assembly enacts provisions that establish binding legal rules is that of federal acts or ordinances. This statement presupposes that the Federal Assembly enacts provisions that establish binding legal rules, i.e. that the Federal Assembly is vested with legislative power.

The Federal Constitution at no point asserts *explicitly* that the legislative power is vested in the Federal Assembly. Article 148, which introduces the Federal Assembly as an institution, merely states that, subject to the rights of the People and the Cantons, the Federal Assembly is the supreme authority of the Confederation. Barring speculation on a possible entailment from the rather vague notion of "supreme authority", the legislative function of the Swiss parliament is thus established solely by means of presupposition, viz. by the presupposition contained in the first paragraph of Article 163 cited above (cf. [30, pp. 372 & 435]).

The dual nature of Article 163 as (a) a norm prescribing (by assertion) the forms in which enactments must be issued and (b) a norm vesting (by presupposition) certain powers in the Federal Assembly is reflected in its particular location within the broader structure of the text: it is the first article of the section defining the "Powers" of the Federal Assembly. This location would be hard to justify if the article was to be reduced to the content stated explicitly; it is only plausible if the presupposition triggered by the adverbial phrase in Paragraph 1 is considered to be the primary content.

In their dual nature, the sentences of Article 163 violate one of the most frequently cited rules of legislative drafting, namely the one requiring that a single sentence should not contain more than one statement or norm. For legislative

editors, it is crucial to determine whether the presupposition introduced by a modal adverbial has been expressed explicitly at any other place in the text. If this is not the case, as in our example, such a presupposition will be the less desirable, the more independent its content is from the content asserted explicitly. That is, legislative editors will have to anticipate whether the norm that is only presupposed is likely to play a role of its own, or whether it will only ever be relevant in combination with the norm expressed in the carrier sentence. The norm presupposed in Article 163, vesting the Federal Assembly with legislative power, will clearly be referred to in contexts where the form that particular Federal Assembly enactments must take is irrelevant; from the perspective of legislative drafting, it would thus have deserved to be asserted explicitly in a statement of its own.

3.3 Focus Adverbials

In legislative texts, focus adverbials (e.g. *only, exclusively*, *notably, in particular*) serve the purpose of restricting or expanding the range of cases to which a particular norm applies or the legal consequences it has. They also act as presupposition triggers. Consider, for instance, the provision contained in Article 191*c* of the Federal Constitution:

(15) Die richterlichen Behörden sind in ihrer rechtsprechenden Tätigkeit […] *nur* dem Recht verpflichtet.

'In the exercise of their judicial powers, the judicial authorities are […] bound *only* by the law.'

This statement *presupposes* that, in the exercise of their judicial powers, the judicial authorities are bound by the law, and it *entails* that they are not bound by anything else: the former is preserved under negation (*In the exercise of their judicial powers, the judicial authorities are not only bound by the law*), whereas the latter is not.

While the adverb *only* has a restrictive effect, expressions such as *notably* and *in particular* lead to the expansion of a clause. The following sentence (Art. 129, Para. 2, Sent. 2, of the Federal Constitution) may serve as an example:

(16) Von der Harmonisierung ausgenommen bleiben *insbesondere* die Steuertarife, die Steuersätze und die Steuerfreibeträge.

'Tax scales, tax rates, and tax allowances, *in particular*, are excepted from harmonisation.' [10]

The focus adverbial *in particular* presupposes that there may be items other than the ones listed that are also excepted from nation-wide harmonisation. [11] This type of

[10] Compare the wording in the authentic French version: "Les barèmes, les taux et les montants exonérés de l'impôt, notamment, ne sont pas soumis à l'harmonisation fiscale.

[11] In the present case, the negation test cannot be used to assess whether the implied content is a presupposition: it is unclear how a sentence that contains the adverbial *in particular* is to be negated (cf. Beaver and Guerts [3, p. 2435] on the related problem of negating sentences containing the adverb *too*). However, the implied content can be shown to be a presupposition because it is preserved if the statement is transformed into a question: *Are tax scales, tax rates, and tax allowances in particular excepted from harmonisation?*

presupposition is particularly frequent in Swiss constitutional and administrative law. Its function is *expansive*, i.e. it serves as a means to open up a clause for further options that the legislator does not wish to specify explicitly.

From the perspective of legislative drafting, the main advantage of the use of focus adverbials like *in particular* to open up provisions is conciseness: only presupposing that there may be further options takes less space than asserting the same thing explicitly. The main disadvantage is the lack of specificity that comes with such a presupposition: the provision cited in (16), for instance, does not only leave it open what further exceptions from tax harmonisation there may be, it also does not specify who is authorised to designate such further exceptions. In individual cases, the use of a presupposition to open up a clause may thus lead to legal uncertainty.

Such situations can be avoided if the clause is opened up by means of assertion, as it has been done, for instance, in Article 168, Paragraph 2, of the Federal Constitution:

(17) **Art. 168** Wahlen
[1] Die Bundesversammlung wählt die Mitglieder des Bundesrates, die Bundeskanzlerin oder den Bundeskanzler, die Richterinnen und Richter des Bundesgerichts sowie den General.
[2] *Das Gesetz kann die Bundesversammlung ermächtigen, weitere Wahlen vorzunehmen oder zu bestätigen*.

'**Art. 168** Appointments
[1] The Federal Assembly elects the members of the Federal Council, the Federal Chancellor, the judges of the Federal Supreme Court and the General.
[2] *Statute may authorise the Federal Assembly to make or confirm further appointments*.'

The first paragraph of this article contains a closed list of authorities whose members are elected by the Federal Assembly. Adding the expression *in particular* would have opened this list to further options. Here, however, a second paragraph fulfils this function: Paragraph 2 states explicitly that further appointments may be delegated to the Federal Assembly and that such a delegation must be provided by statute. In this last point, it is thus more specific than the presupposition trigger *in particular* would have been. When faced with the task of opening up a clause, legislative drafters will thus have to weigh the conciseness gained by using a presupposition against the additional specificity that can be obtained by adding an explicit statement.

3.4 Assessment Verbs

Factive verbs (e.g. *confirm, know, notice, realise*) have been frequently listed as typical presupposition triggers in narrative discourse (*Nancy knows that it takes 8 h to get to Rome* presupposes *It takes 8 h to get to Rome*). In normative texts, they do not play a significant role. However, the particular deontic nature of normative texts

entails that assessment verbs (e.g. *assess, check, evaluate, verify*) come to function as presupposition triggers in ways that resemble the way in which factive verbs trigger presuppositions in narrative contexts. As an example, consider the following sentence from a draft of the Swiss Ordinance on the Promotion of Research and Innovation (cf. [9, p. 276]):

(18) Die KTI *beurteilt*, ob eine Forschungsstätte nicht kommerziell ausgerichtet und ob sie beitragsberechtigt ist, nach folgenden Kriterien: […].

'The CTI [Committee for Technology and Innovation] *assesses* whether a research institution has a non-commercial orientation, and whether it is eligible for grants, according to the following criteria: […].'

In the deontic context of normative texts, the requirement to assess whether some condition is fulfilled presupposes that the respective condition needs to be fulfilled in the first place. In the above example, the norm that the CTI is to assess whether research institutions applying for grants have a non-commercial orientation presupposes that, in order to be eligible for grants, research institutions need to have a non-commercial orientation. In the cited version of the draft, this requirement was effectively introduced by said presupposition; it had not been expressed anywhere else. [12] Assessment verbs like the one above can thus trigger presuppositions of the deontic type, i.e. presuppositions that impose additional obligations on the subjects of the law.

From the perspective of legislative drafting, a sentence like the one in (18) may turn out to be problematic because it hides a general principle (that only non-commercial research institutions are eligible for grants) in a statement that details procedural matters (that the eligibility of an institution is to be assessed by the CTI and that in this process the specific criteria listed thereafter are to be applied). General principles often have an impact on the application of other norms, which have to be interpreted against the background of those principles. If they are hidden in a procedural provision, they run the risk of being overlooked in the application of the law. Legislative drafters will thus have to consider whether it would not be better to express the two things in separate statements, maybe even placed in different parts of the text: the general principle in a section on aims at the beginning of the statute or ordinance, the procedural provision in a respective section further to the back.

3.5 Temporal Clauses and Past Participles

A statement saying that an event *B* happened after an event *A* presupposes that *A* happened too: for instance, the sentence *After the company went bankrupt, all*

[12] Note that there is a second presupposition in sentence (18), triggered by the modal adverbial *according to the following criteria* (cf. Sect. 3.2): the procedural provision that the eligibility of an institution needs to be assessed by the CTI is in fact also merely presupposed rather than asserted. The sentence thus contains the following three provisions: (a) that to be eligible for grants, research institutions must be non-commercial, (b) that the eligibility of research institutions must be assessed by the CTI, and (c) that said assessment must be made according to the criteria listed thereafter. Only (c) is asserted, (a) and (b) are merely presupposed.

employees were made redundant presupposes that the company went bankrupt. In legislative texts, this type of presupposition can take on an additional deontic aspect if the past event to which a provision refers itself only exists by virtue of the law rather than independently of it. Consider Article 139, Paragraph 1, of the Swiss Federal Constitution:

(19) 100000 Stimmberechtigte können innert 18 Monaten *seit der amtlichen Veröffentlichung ihrer Initiative* eine Teilrevision der Bundesverfassung verlangen.

'Any 100,000 persons eligible to vote may within 18 months *after the official publication of their initiative* request a partial revision of the Federal Constitution.'

In this sentence, the temporal clause *after the official publication of their initiative* does not just introduce a temporal condition on the main clause but also introduces, by means of presupposition, an additional obligation: the federal authorities must publish the initiatives they receive (which, in turn, presupposes that initiatives must be submitted to the authorities for official publication).

Past participles can have a similar effect as they also refer to events preceding the event denoted by the main statement. The effect can be observed, for instance, in the following provision from a draft bill aimed at amending the Swiss railway legislation:

(20) Sie können entweder zusätzliche Massnahmen oder alternative Massnahmen finanzieren, wobei sich im zweiten Fall ihr Anteil auf die Differenz zwischen der vom Bund beschlossenen und der von ihnen *beantragten* Massnahme beschränkt.

'They can fund either additional measures or alternative measures; in the latter case, their share is limited to the difference between the measure designated by the Confederation and the measures *applied for*.'

By referring to *the measures applied for*, this norm presupposes that a formal application is necessary for some measures to be considered. It thus creates an indirect obligation: if only measures that one formally applied for are considered, then the process of applying becomes a compulsory component of the described process. The draft containing example (20) did not state the respective obligation anywhere else in the text. It only established the obligation through the presupposition introduced by the past participle in (20).

From the perspective of legislative drafting, the danger with presuppositions triggered by temporal clauses and past participles is once more that they may obfuscate certain obligations defined by the law and thus result in provisions that lack transparency. If some steps of a procedure are hidden in the description of other steps, it often means that the temporal order in which the individual steps are to be taken is not reflected in the surface structure of the text. It may thus take extra time and effort to reconstruct the exact procedure laid out in the law. With regard to the provision cited in (20), the drafting committee of the federal administration

consequently requested that the obligation hidden in the past participle *applied for* be made explicit in a separate statement.

Transparency is reduced even more if the asserted step and the presupposed step are aimed at different addressees. This is the case, for instance, in the provision cited in (19): the content asserted by the main clause is aimed at the People, whereas the step presupposed by the temporal clause is to be carried out by the authorities.

4 Conclusions

The analysis presented in this paper has shown that a broad range of linguistic constructions can introduce presuppositions into legislative texts. As presuppositions transport implicit content that, just like the content asserted explicitly, forms part of what the law prescribes, it is vital that legislative drafters recognise and assess them properly. They must weigh the main advantage of using presuppositions, conciseness, against the main downside, reduced transparency.

The present study has argued that the details of such an assessment depend on the function the presupposition fulfils in the text, i.e. whether it is (a) referential, (b) constitutive, (c) deontic or (d) expansive. Each of the functions identified gives rise to specific constraints along which legislative drafters can decide on the benefit and detriment of using a presupposition. The key criterion for assessing *referential* presuppositions is whether they refer to what Searle [24] calls a "brute fact" or to an extralegal social institution. In the former case, the use of a presupposition is unproblematic. In the latter case, the norm may be rendered obsolete once the social institution to which it refers has been dissolved. In contrast, the use of presuppositions for *constitutive* purposes mainly seems to be a matter of convention and constitutional continuity. It can help keeping the texts concise and avoiding stating the obvious. The most problematic type of presuppositions are those that have a *deontic* effect, i.e. presuppositions that impose new obligations on the subjects of the law. The more independent the presupposed content is from the asserted content, the more imperative it is that it is expressed explicitly rather than hidden as an implicit precondition. This is the case, in particular, if the presupposed content and the asserted content do not have the same addressee. As a general rule, all obligations must be made transparent. Finally, presuppositions triggered by focus adverbials such as *in particular*, i.e. presuppositions with an *expansive* function, are usually unproblematic. However, legislative drafters must be aware that such presuppositions sometimes lack the specificity of a statement that explicitly opens up a clause to further options. An explicit statement is to be preferred if this lack of specificity can lead to legal uncertainty.

In summary, the present study shows that, if administered carefully, presuppositions can be a useful stylistic means to keep legislative texts free from unnecessary clutter that merely elaborates on the obvious; however, it also suggests that, if applied wrongly, presuppositions can camouflage the duties and obligations placed on the subjects of a law and thus infringe on its accessibility and its efficient and effective implementation.

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